

Response to City's July 14, 2021 letter concerning EPA's Administrative Order for Remedial Action, Removal Action, and Remedial Design, Index No. CERCLA-02-2021-2010

Introduction and Summary of EPA's NOIC Responses

On July 14, 2021, the City of New York sent a 37-page letter to EPA (hereinafter, the Notice of Intent to Comply or "NOIC") concerning the City's intentions regarding compliance with EPA's Administrative Order for Remedial Action, Removal Action, and Remedial Design (the "Order") issued to the City on March 29, 2021, as subsequently amended by EPA's letter dated June 29, 2021 (the "Amendment Letter"). While EPA is not required to, and often does not respond to NOICs, we are doing so in this case, both because the NOIC contains indications that the City does not intend to fully comply with the Order, and because, as EPA has advised the City in the past, there has been noncompliance with the Order, only some of which has been cured.

The Order, which became effective on June 30, 2021, requires the City to implement a portion of the remedy selected pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9601-9675 ("CERCLA" or "Superfund"), in EPA's September 27, 2013 Record of Decision ("ROD") for the Gowanus Canal Superfund Site ("Site" or "Canal") in Brooklyn, New York.

The components of the Remedial Action ("RA") to be implemented pursuant to the Order consist of various Combined Sewer Overflow ("CSO") controls (the "CSO remedy") to reduce overall contaminated solid discharges to the Canal and prevent recontamination of the Canal after completion of the dredging and capping components of the remedy. The CSO remedy includes the construction and operation of two retention tanks ("CSO Tanks") to control hazardous substance-contaminated solids discharges from the two largest CSO outfalls by volume. The larger of the two CSO Tanks has been designated the "RH-034 Tank," while the second, smaller tank, has been designated the "OH-007 Tank," based on the identifier for the CSO outfall at each location.

In addition, the CSO remedy includes various complementary measures necessary to limit or offset the addition of stormwater and sewage loads to the already constrained sewer system. Such discharges, if not controlled, could compromise the effectiveness of the overall remedy, including recontamination by exceeding the capacity of the CSO Tanks and/or by causing increased contaminant discharges at other CSO or stormwater outfalls. The City's own reports and planning documents project increased sanitary and stormwater loads to occur, including from the Gowanus area rezoning and from climate change. The ROD-required measures address these risks by requiring the appropriate implementation of applicable City regulations for sewer connections and stormwater control regulations within the Gowanus Canal sewershed, and via the separation and treatment of stormwater to the maximum extent practicable at properties and street ends along the Canal banks, as well as the necessary associated monitoring and reporting to track the effectiveness of the CSO remedy.

The Order sets new schedule requirements for the design of the OH-007 Tank, as a result of the City's noncompliance with the requirements in Administrative Order for Remedial Design ("RD"), Index Number CERCLA-02-2014-2019, issued on May 28, 2014 (the "City RD UAO"). The Order also provides the RA schedule for both CSO Tanks. Lastly, the Order requires the construction of a bulkhead at the City-owned location for the OH-007 Tank to support the tank construction and the next phase of dredging in the Canal.

In its NOIC, the City asserts that it has a basis for not complying generally with the Order, and then with a number of specific Order requirements. For the purpose of this response, EPA has categorized the specific objections as follows: 1) deadlines for the work; 2) adherence to municipal stormwater regulations at new development projects (including the City's 2021 Unified Stormwater Rule ("USWR")); 3) separation and treatment of stormwater at City-owned Canal-side street-ends; 4) EPA approval for siting and access to property that the City proposes to use in connection with the OH-007 tank; and 5) discharge monitoring and reporting requirements to ensure the CSO remedy remains protective.

An initial argument made by the City is that the requirements of the Order related to the CSO components of the ROD are arbitrary and capricious. EPA disagrees and, as discussed below, not only did the City waive this argument in a prior settlement, EPA has shown a reasonable basis for each and every requirement in the Order, including in the Order itself and in prior communications with the City, such as at the April 29, 2021 conference between EPA and the City about the Order, in EPA's responses to the City's comments on the Order prior to it becoming effective, and in the Amendment Letter's clarifications to the Order.

The statements in the NOIC to the effect that the City cannot meet the timeframes in the Order essentially amount to assertions that the City's consultants disagree with EPA's consultants, and that City timeframes for other projects are inapplicable here. EPA continues to believe that the timeframes in the Order are achievable and reasonable. EPA and the City had extensive discussions before the Order was issued about the amount of time needed for the City to implement the various tasks, and the time frames ultimately included in the Order followed EPA's consideration of all of those discussions.

The City's objections to the requirement in the Order that the City's municipal stormwater regulations be complied with for new construction so as to not adversely affect the CSO component of the remedy are puzzling. Compliance with non-federal requirements is a routine part of Superfund remedies, yet the City objects to enforcing its own regulations to ensure the remedy's protection of human health and the environment, raising legal arguments that, as discussed below, are spurious.

The City's arguments about many of the work requirements in the Order amount to asserting that EPA lacks legal authority. These requirements were selected in a ROD issued under CERCLA after public comment, and/or are requirements inherently necessary to ensure the effective implementation of, and/or ascertain the protectiveness of, the remedy. The City does not have a basis for asserting that it is arbitrary and capricious for the Order to require monitoring that EPA has determined is needed to ascertain whether the remedy is performing effectively. Such arguments by a potentially responsible party ("PRP") fundamentally misapprehend the role and authority of EPA to have Superfund remedies effectively implemented and ensure that they are protective.

The City's objection to separation and treatment of stormwater at City-owned street-ends is unfounded. Not only is this requirement necessary for the protectiveness of the ROD remedy, as discussed below, this requirement currently applies to only three street-ends that have not already been addressed. As developers have already indicated a willingness to undertake such work, this requirement can be accomplished at little or no cost to the City. Moreover, as with other Order requirements, the City mistakenly asserts that each remedial component, whether major or minor, must be separately evaluated

under the nine-criteria analysis in a ROD. This is incorrect.

As to the City's argument that EPA does not have the authority to require the City to seek approval from EPA for siting and access to property that the City proposes to use in connection with the RD/RA of the OH-007 Tank, as discussed below, the City previously requested that EPA formally direct it to change such a location (property needed for the RH-034 Tank).

The various discharge monitoring and reporting requirements are ones that EPA has determined will enable EPA to ascertain the effectiveness of remedy implementation and/or the protectiveness of the remedy under CERCLA. To the extent that the City has concerns about the magnitude or details of these requirements, the Order provides an opportunity to discuss or propose the form and content of each. See Subparagraphs 73.b., c., d. and e.

Set forth below are further responses from EPA to some of the assertions in the NOIC. We are not responding to every point raised in the NOIC, for reasons including that some of the City's assertions have been previously addressed by EPA or do not warrant a response at this time. EPA reserves the right to respond in the future as appropriate. Nothing in this letter should be construed as an admission by EPA of any assertion made in the City's NOIC.

Much of the work required by the City RD UAO and Administrative Settlement Agreement and Order for Remedial Design, Removal Action and Cost Recovery, Index Number CERCLA-02-2016-2003, issued on June 9, 2016 ("Tank AOC") is interrelated with work required under the 2021 Order. The schedule set forth in the Order necessarily reflects the existence of prior delays. However, new or continued noncompliance with EPA's three orders poses the strong potential to impact the protectiveness of the in-Canal remedy through the delay in controlling the City's continued discharge of contaminated CSO solids into the Canal, where dredging commenced in November 2020. The prospect of increased contaminant loading because of greater CSO discharges as a result of residential development in the Gowanus area and the increased frequency of severe storm events makes it all the more important that the City comply with the schedule in the Order and avoid adverse impacts to the in-Canal remedy.

The City's expressed intention to not comply with various provisions of the Order, some of which noncompliance has already occurred, together with its continued noncompliance with provisions of the two prior EPA orders, is particularly troubling at this stage of remedy implementation. In 2015, EPA publicly expressed significant concerns with the City's delays regarding the CSO controls and increased costs that would result from the City's insistence on locating the RH-034 Tank on private land rather than publicly owned land. A central basis for EPA's agreement to set aside those concerns and enter into the Tank AOC was the City's assurance that it would thereafter cooperate in good faith to expeditiously implement the CSO remedy. Unfortunately, the implementation of the work since that time has not been expeditious, as discussed in more detail below.

In summary, the City's current and prior noncompliance is well-documented. The NOIC arguments are not corroborated by the facts and/or omit key facts, and thus do not constitute sufficient cause for the City's stated intent to not fully comply with the Order.

Specific NOIC Statements and EPA Responses

Statements from the NOIC are set forth below with reference to the page number of the NOIC, followed by EPA's response.

1. NOIC Statement: The City asserts that clarifying language it submitted on May 5, 2021 was not incorporated into the Order and that the revisions made by EPA to the Order did not address the City's legal and technical concerns. NOIC at 1-2.

EPA Response: In general, the City's May 5, 2021 proposed language did not accurately reflect the clarifications that EPA discussed with the City, including at the conference on the Order that was held on April 29, 2021. Rather, the City's proposed language went beyond what EPA had indicated it was prepared to incorporate into the Order. Moreover, many of the City's positions and arguments, including the proposed language in its May 5, 2021 letter, were inconsistent with the ROD, Superfund implementation practices, and the expert judgment of the Agency. It should also be noted that EPA engaged in extensive, uniquely Site-specific discussions with the City before the Order became effective in an effort to ensure compliance with the Order. In addition to the April 29, 2021 conference, EPA held meetings with the City on November 23, 2020, December 7, 2020, January 19, 2021 and January 20, 2021, and numerous written communications and submissions between the City and EPA were also made. EPA included its intended clarifications into the Order, as amended, via the Amendment Letter. Throughout discussions regarding the work, the schedule, and the Order, EPA considered all of the City's input.

2. NOIC Statement: The City asserts it does not intend to comply with specific aspects of the Order because of "objective evidence," and that its position is "reasonable and made in good faith." The City also asserts that, given its good faith position, it is not in willful noncompliance with the Order. NOIC at 3-4.

EPA Response: EPA does not agree with the City's assertions. Many of the NOIC objections are based on arguments that the Order contains CSO remedy provisions that are arbitrary and capricious or otherwise not consistent with the National Contingency Plan ("NCP") remedy selection process provisions. These are legal defenses that the City waived in the Tank AOC. In that order, the City and EPA agreed to the design of the RH-034 Tank at a location proposed by the City that was vastly more costly than the location contemplated by EPA in the ROD. EPA's entry into the Tank AOC was based upon, among other things, the City's explicit waiver of challenges to the CSO remedy. See Paragraph 104 of the Tank AOC.

Also, EPA conducted extensive discussions with the City both prior to and following the issuance of the Order, despite the unilateral nature of the Order. This included a year-long consultation and review effort with the City devoted to schedule-related issues, the result of which was the adoption by EPA of many, though not all, of the City's proposed timeframes. The purpose of the discussions was for EPA to obtain input from the City on the scope and timing of the required work, which resulted in a schedule that was largely arrived at through a collaborative effort. Where EPA disagreed with the City, EPA provided the City with its rationale. Such a considered process precludes a finding that the Order is arbitrary and capricious. Finally, as explained further below, EPA has found that many of the technical

assertions made by the City in connection with the Order and the CSO remedy lack appropriate technical support and are inconsistent with assertions the City has made in other forums.

3. NOIC Statement: The City asserts it has sufficient cause to not comply with the Order because the City provided a projected schedule for construction of the CSO Tanks to EPA in December 2018 as a point of comparison in the context of the City's proposal to change the selected CSO remedy for the Site from the CSO Tanks to a tunnel system. The City claims EPA only responded to that schedule when it was proposed to EPA in the period leading up to the issuance of the Order and that EPA offered no technical support for its alternate schedule. NOIC at 6-7.

EPA Response: A number of the NOIC arguments, including related to work deadlines, rely on information submitted by the City in connection with its proposal to substitute a CSO tunnel for the CSO Tanks. For the reasons set forth below, the City's reliance on the December 2018 schedule in connection with the Order is unwarranted.

The tank construction schedules prepared by the City in December 2018 were not submitted to EPA for review and approval. Rather, they were submitted in order to make the point that the City believed it could construct a tunnel in a comparable time frame to the timeframe for the two CSO Tanks. RA construction schedules are a deliverable for EPA review and approval as part of the RD submission process under the RD orders. The City was instead seeking EPA approval of a change from the ROD-selected tanks to a CSO tunnel. The majority of information submitted for the tunnel proposal was in the form of PowerPoint presentations with little or no supporting engineering analysis.¹

The City did not request EPA review and approval of the CSO Tank RA schedules at the time of the tunnel discussions, nor at any time thereafter. Instead, over a five-month period from July 2020 to December 2020, the City submitted to EPA three superseding tank construction schedules (one of which excluded OH-007 dates), none of which matched the December 2018 schedules or each other. The City only raised the December 2018 schedules as an issue in the NOIC.

The City asserted it possessed the capability for performing the contracting, design, and construction of a major and complex tunnel under an aggressive schedule. As noted in EPA's September 20, 2019 letter rejecting the tunnel proposal, EPA hoped to see that expedited capability applied to the CSO portion of the Site remedy, which the City was already under order to perform. As discussed below, unbeknownst to EPA at that time, the City had in 2016 almost completely defunded its OH-007 Tank RD work under the City RD UAO, causing delays in the cleanup of the Site.

¹ Documents submitted to EPA by the City in connection with its tunnel proposal contained contradictory statements regarding key technical claims about the proposal's purported benefits, raising concerns about the overall reliability of the tunnel-related submissions, which included the December 2018 schedule cited in the NOIC. See the City's September 10, 2018 tunnel proposal presentation and the City's September 27, 2018 cover letter to EPA and attached technical memorandum.² The City claims that its December 2018 proposed schedule contained all the interim design and construction dates to meet these completion dates, and that all subsequent schedules submitted by the City did the same. NOIC at footnote 3. The documentary record contradicts both assertions. The City's December 2018 proposed schedule provided only overall design and completion timeframes, without interim milestones. Further, in a September 2, 2020 letter to the City addressing its request for financially-based extensions, EPA detailed the City's failure to provide OH-007 CSO Tank RD and construction schedules in the City's four prior submissions, as well as the City's statement that it wouldn't be able to provide such design or construction schedules until "six months or more" in the future.

EPA's detailed discussions with the City on the schedules for the CSO portion of the remedy began in connection with the City's June 24, 2020 request for 12-month and 18-month extensions to complete the construction of the RH-034 Tank and OH-007 Tank, respectively. The City asserted the need to provide more flexibility in the next two fiscal years as a result of alleged COVID-19-related budgetary impacts. Following EPA's November 6, 2020 denial of those extension requests, EPA continued to engage the City about its noncompliance with the RD orders in an effort to advance CSO remedy implementation.

As noted above, those discussions continued after EPA's March 29, 2021 issuance of the Order, culminating in EPA's June 29, 2021 Amendment Letter, which made the Order effective on June 30, 2021. EPA's exchanges with the City and the Agency's deliberations on these matters totaled a period of just over one year.

4. NOIC Statement: The City claims that courts acknowledge explicitly that "substantial compliance" and the doctrine of "impossibility" are proper grounds for satisfying the "sufficient cause" defense and that the City satisfies these bases here, including based on financial and technical difficulty and its willingness stated elsewhere in the NOIC that it will construct both the CSO Tanks and the bulkhead. NOIC at 5-6.

EPA Response: The City's argument that technical and financial difficulty create an impossibility are unavailing. Courts have consistently rejected arguments that the financial constraints of a respondent constitute sufficient cause to not comply with an EPA CERCLA UAO. See U.S. v. Parsons, 723 F.Supp. 757, 763 (N.D. Ga. May 30, 1989); U.S. v. LeCarreaux, 1991 WL 341191, at *26 (D.N.J. July 30, 1991). Equally, respondents to CERCLA orders have consistently failed in attempted sufficient cause defenses based upon impossibility to conduct the response action, whether said reason is fabricated by the respondent or not. See U.S. v. Barkman, 1998 WL 962018, at *18 (E.D.Pa. Dec. 17, 1998)(rejecting respondent's argument that, after misleading EPA that work continued, he had ceased conducting the work because he could not relocate his business from the site after exerting insufficient effort to relocate his business)(reconsidered in part in U.S. v. Barkman, 1999 WL 77251 (E.D. Pa. Feb. 5, 1999) on the basis of a newly discovered expert report that did not alter the court's view that EPA's selection of the remedy was not arbitrary and capricious); U.S. v. Capital Tax Corp., 2007 WL 2225900, at *13 (N.D.Ill. Aug. 1, 2007)(rejecting argument that respondent's eviction from the site property created a sufficient cause for noncompliance; case remanded on other grounds). A sufficient cause defense must be based upon an objectively reasonable basis for believing an order is invalid or inapplicable to the recipient. See U.S. v. Dico, 808 F.3d 342, 352 (8th Cir. 2015) (quoting Solid State Circuits, Inc. v. EPA, 812 F.2d 383, 391 (8th Cir. 1987)). Technical or financial impediments, whether created by a respondent or others, have never been recognized by courts to constitute such an objectively reasonable basis.

The City's assertion that "substantial compliance" with an order can qualify as a sufficient cause defense is similarly misplaced. The case law the City cites to, Employers Ins. of Wausau v. Browner, 52 F.3d 656 (7th Cir. 1995), does not establish such a defense but is mere dicta and EPA is unaware of any CERCLA case law relating to Section 106 orders that has been decided on such grounds. Moreover, the City states in the NOIC that it will not comply with certain Order requirements and that it has sufficient cause for such noncompliance.

5. NOIC Statement: The City asserts that its proposed Tank completion dates (September 30, 2030 for the RH-034 Tank and December 31, 2029 for the OH-007 Tank) support its sufficient cause

defense. The City asserts that these dates, first proposed in December 2018 as part of its tunnel proposal, are based on alleged EPA-created delays to the RH-034 Tank demolition resulting from the brick salvaging requirement for the 234 Butler Street historic façade, and because, while EPA considered the tunnel alternative, the City “held off” on OH-007 Tank design work. The City asserts that EPA did not explain the basis for its completion schedule and thus noncompliance with the timeframes in the Order are justified. NOIC at 6-7.²

EPA Response: The City has vacillated repeatedly regarding the RD and construction schedules for the CSO Tanks. The City’s shifting positions regarding both schedules and preservation requirements at 234 Butler Street are examined in further detail below.

During EPA’s review of the tunnel proposal, the City was not legally authorized to unilaterally “hold off on” the OH-007 Tank RD. Moreover, the City’s decision to delay the OH-007 Tank RD was unrelated to either the tunnel proposal or the Order. As detailed further below, that decision was made by the City in July 2016, more than two years before the December 2018 schedule was presented to EPA. The City did not obtain a replacement RD contract until May 31, 2021, as noted at NOIC page 2. The City was thus not meeting its own 2018 schedule for the OH-007 Tank RD or construction at any point in time. The City withheld from EPA the fact that it had defunded the OH-007 Tank RD work until February 2020 and withheld the timing of that defunding until July 2021, after issuance of the Order.

6. NOIC Comment: The City claims that on December 7, 2020 it provided “aggressive” schedules that proposed construction completion dates of August 31, 2030 and June 30, 2029 for the RH-034 and OH-007 tanks, respectively. Compared to the proposed schedule the City submitted to EPA in December 2018, this schedule saved one month on construction completion for RH-034 and six months for OH-007, which the City claims would be achieved by using unprecedented, costly measures. NOIC at 7.

EPA Response: The City’s one-month and six-month time savings from its proposed 2030 and 2029 completion dates are minor savings in the context of the respective 15 and 16 year-long design and construction periods estimated by the City for the two tanks that began in May 2014 when EPA issued the City RD UAO. Given the City’s delays, EPA proposed and ultimately included in the Order achievable construction completion dates that will see the RH-034 Tank constructed 15 months earlier than the City’s latest schedule, and completion of the OH-007 Tank 18 months earlier than proposed by the City and thus end CSO solids discharge recontamination that much sooner.

² The City claims that its December 2018 proposed schedule contained all the interim design and construction dates to meet these completion dates, and that all subsequent schedules submitted by the City did the same. NOIC at footnote 3. The documentary record contradicts both assertions. The City’s December 2018 proposed schedule provided only overall design and completion timeframes, without interim milestones. Further, in a September 2, 2020 letter to the City addressing its request for financially-based extensions, EPA detailed the City’s failure to provide OH-007 CSO Tank RD and construction schedules in the City’s four prior submissions, as well as the City’s statement that it wouldn’t be able to provide such design or construction schedules until “six months or more” in the future.

EPA sent a letter to the City on November 3, 2020 regarding the need to abate the City's delays related to the CSO Tanks. EPA noted potential methods for saving time and money, including, for example, performing certain tasks in parallel, as well as EPA's ability to secure an OH-007 Tank staging area at no cost to the City, an effort which would also likely expedite the work. The City's assertion that time savings are being achieved through "unprecedented, risky and costly" measures is not corroborated by any supporting documentation, and thus cannot be evaluated by EPA.

In addition, the City's assertions of its ability to accelerate contracting, design and construction under the approach proposed for use in constructing a tunnel to replace the tanks, only raises the question of why the City is unable to similarly accelerate its tank work.

7. NOIC Statement: The City asserts that it provided a detailed presentation to EPA demonstrating the basis for the City's "accelerated" schedule, including its Basis of Schedule Reports ("Schedule Reports") for the RH-034 CSO Tank construction phases, which the City asserts contained every assumption the City used in developing its schedule. NOIC at 7.

EPA Response: In both the NOIC and during meetings leading up to the Order, the City placed significant reliance on the Basis of Schedule Reports. EPA carefully evaluated these reports when they were provided to EPA. Despite EPA's continued efforts to obtain the benefit of the City's input, much of the information provided, including the Basis of Schedule Reports, was contradictory and/or dated, and therefore cannot be considered technically objective or reliable.

After rejecting the City's extension request in early November 2020, and following the start of dredging that month, EPA provided the City with a draft CSO remedy schedule on November 20, 2020, in advance of a November 23, 2020 EPA/City discussion of the pending Order. EPA's draft schedule was based primarily on a review of prior City CSO schedule submissions, and called for the RH-034 Tank to be completed by June 2029 and the OH-007 Tank by June 2028.

Contemporaneously, the City wrote to City Councilmembers Lander and Stevens on November 16, 2020, stating that neither tank could be completed before 2032 and that EPA statements to the community regarding shorter completions dates were inaccurate. Despite this, on December 4, 2020, the City submitted its own expedited schedule to EPA that provided for completing the RH-034 Tank in 2030, and the OH-007 Tank in 2029.

Following a December 7, 2020 meeting, the City, for the first time, provided EPA with the Basis of Schedule Reports on December 11, 2020 to support the validity of its new, shorter RH-034 Tank 2030 completion timeframe. These reports contained construction timeframe estimates for three Construction Packages ("CPs"): CP-1 (demolition); CP-2 (below grade tank excavation and construction); and CP-3 (headhouse). The Basis of Schedule Reports were dated May 2017, January 2019, and June 2019, respectively. Notably, these reports all predate the City's assertions that both tanks could not be completed until 2032.

Following EPA's and its consulting structural engineer's review of the Schedule Reports, on January 15, 2021, EPA provided the City with a revised schedule that included shorter timeframes for several tasks, resulting in the RH-034 Tank being completed by September 2028 and the OH-007 Tank being completed by May 2028. EPA's draft schedule reductions were based on, among other things, certain

level-of-effort adjustments. An EPA/City meeting regarding the revised EPA draft schedule was held on January 19, 2021. When the topic arose as to why the City had not submitted the Basis of Schedule Reports earlier, the City noted that it was “not required to do so” under the terms of the Tank AOC. An additional EPA/City meeting was held on January 29, 2021 during which schedule-related presentations were made by the City and EPA’s consulting structural engineer.

Following the January 29, 2021 meeting, the EPA project team, together with its consulting structural engineer, considered the City’s further schedule input. Based on that review, EPA concluded that it would be appropriate to adjust the timeframes to March 2029 for the completion of the RH-034 Tank and to May 2028 for completion of the OH-007 Tank.

As the government agency responsible for implementing CERCLA to protect public health and the environment, EPA gave careful consideration to the information provided by the City, including the Basis of Schedule Reports, in determining the schedule set forth in the Order. In this context, EPA concluded that RH-034 CP-2 could feasibly be completed in a shorter period than the City asserted. If reliable updated information becomes available, as noted, the Order provides a mechanism for the City to request a schedule modification. It should be noted that there is no requirement that the Agency’s schedule selection determination in a unilateral order to a responsible party be subject to that party’s concurrence.

8. NOIC Statement: The City asserts that its schedule for the OH-007 Tank construction is consistent with a “final draft” of a Basis of Design Report (“BODR”) dated May 2018, for the OH-007 Tank. NOIC at 7 and 9.

EPA Response: The City’s reliance on the May 2018 draft OH-007 BODR as the basis for the OH-007 schedule is difficult to understand, because the City later argues in the NOIC that the May 2018 BODR needs to be updated, which will involve a complex review.

The May 2018 BODR schedule, which was over three years old at the time of the NOIC, was invalid and unachievable when submitted to EPA in May 2018. This is because achieving that schedule required the timely advancement of the OH-007 Tank RD, which did not occur, as the City had defunded and halted almost all of the OH-007 Tank RD effort in July 2016, a fact not documented in the May 2018 BODR nor timely disclosed to EPA by the City. EPA only became fully aware of this defunding in February 2020, when the City responded to detailed questions about the nature and cause of OH-007 Tank RD delays following EPA’s denial of the tunnel proposal. As noted at NOIC page 2, the OH-007 Tank RD only resumed again in May 2021, contrary to requirements in the City RD UAO to mitigate delays.

Rather than rely on the May 2018 BODR, EPA reviewed the many contracting, design and construction timeframes provided by the City for the OH-007 Tank. This review revealed, in many instances, no discernable justification for the shifting timeframes. On September 16, 2020, the City estimated the OH-007 Tank RD would take 60 months to complete. Previous City estimates for this work were 30 months (August 31, 2016 and May 17, 2019), 36 months (December 5, 2019), 39 months (July 18, 2018 and March 11, 2019), and 27 months (July 2, 2020).

In August 2020, after having requested an extension for OH-007 Tank work in June 2020, the City indicated that it was “unable to commit to milestones relating to the OH-007 Tank at this time.” The City did not provide an explanation as to how in two months it could go from determining the specific need to add 18 additional months to a completion date approximately ten years in the future to lacking the ability to make any timeframe commitments at all.

Thus, the City’s initial June 24, 2020 request for an 18-month OH-007 Tank construction extension was followed by an August 24, 2020 communication regarding the City’s purported inability to commit to any construction dates for the OH-007 Tank, then by the City being able to make such projections several months later after the extension discussions had evolved into the Order schedule discussions, the result of which the City disputes.

The degree of vacillation in the City’s schedules, including those documented above, strongly suggests that major components of such schedules were not objectively grounded. Despite such concerns, EPA sought input from and consulted repeatedly with the City prior to and after the issuance of the Order. As discussed below, the NOIC discussion of the City’s current schedules does not present the kind of information that would allow a court to overturn EPA’s judgement, particularly in light of this past experience. Also, the Order provides a mechanism for the City to request schedule changes, as EPA has repeatedly noted to the City.

9. NOIC Statement: The City notes that EPA provided the City with a proposed schedule for the CSO Tank construction on January 15, 2021 and that it contained dates that were both earlier than the City’s then-most recent schedule dated December 7, 2020 and also earlier than a proposed schedule EPA had provided to the City on November 20, 2020. The City also claims EPA provided no technical rationale for the January 2021 schedule and did not comment on the City’s December 7, 2020 schedule. NOIC at 7.

EPA Response: As an initial matter, the City fails to mention that from the outset of our schedule discussions, EPA had adopted many of the City’s timeframes as submitted, despite significant reservations about the City’s input regarding prior schedules. As discussions with the City continued, EPA then modified certain timeframes based on EPA’s evaluation of the available information.

Focusing on EPA’s January 15, 2021 draft schedule is also misplaced, as that draft schedule does not represent the final Order schedule. For example, EPA’s final schedule for RH-034 CP-3 construction was six months longer than EPA’s January 15, 2021 draft schedule, after further EPA consideration of the City’s input. And as the City itself notes at NOIC page 8, EPA’s final Order schedule calls for completing construction of the RH-034 Tank and OH-007 Tank only two and three months sooner, respectively, than what was initially proposed in EPA’s November 2020 draft schedule. Adjustments of two-three months are not substantial for work occurring over almost a decade.

With regard to shorter timeframes in EPA’s January 15, 2021 proposal which were included in the final Order schedule, EPA and its consulting engineers carefully considered the City’s longer timeframes and EPA ultimately selected some shorter timeframes based on EPA’s professional judgment that indicated a reasonable basis for the City to expedite certain tasks, resulting in a more timely completion of the CSO Tanks and a net benefit to the overall remedy.

EPA's lengthy, technically reasoned decision-making process, which included accepting the majority of the City's positions, provides strong support that EPA's decision to impose some shorter timeframes was not arbitrary and capricious. As EPA has repeatedly noted, the Order provides a mechanism for the City to seek an extension of timeframes if warranted.

With regard to whether EPA should have provided comments on the City's Basis of Schedule Reports, as noted above, these schedules were not part of any EPA-required submittal under the Tank RD Order. Nothing in CERCLA obligates EPA to comment on such reports.

As EPA and its consulting engineers made clear during discussions with the City, the City's Basis of Schedule Reports were not technically acceptable because they were based on the outputs from a scheduling computer program reliant on various subjective inputs and assumptions. EPA would have had to expend significant time and money to run the same schedule program used by the City, but with EPA's own inputs and assumptions. Rather, after more than a year of schedule discussions with the City, EPA relied on its own professional judgment and that of its consulting engineers to conclude that aspects of the City's schedule lacked technical merit and to ultimately establish the final schedule in the Order.

10. NOIC Statement: The City states that at a workshop held on January 29, 2021, EPA's engineering consultant stated that EPA's schedule was based on several other projects upon which the consulting firm had worked. The City asserts EPA provided only two-sentence descriptions of each of these projects at the workshop and that the City has not been given any detailed information concerning them. NOIC at 8.

EPA Response: The City's characterization of the basis for EPA's schedule is inaccurate. EPA's schedule was primarily based on EPA's review of the totality of information provided by the City since 2016. That includes consideration given to other major infrastructure projects, including other CSO tanks constructed by the City. EPA acknowledged that there are distinctions among the various projects considered. Such differences are present even as between the RH-034 and OH-007 tanks located only blocks apart. Nonetheless, consideration of such projects is relevant to the tank schedule for this Site given that other complex infrastructure projects have been completed in significantly shorter timeframes.

As a separate but related point, at the workshop, EPA's consultant expressed the view that the City's construction timeframes were overly long when compared to industry standards, including municipal standards, based on his national and international experience as a structural engineer.

The NOIC at page 8 contains a review of the projects cited by EPA's consultant at the workshop, which suggests that the City has obtained additional and adequate information to consider the qualitative similarities and differences of those projects. The City also has the benefit of the expertise of its consulting engineers, Hazen and Sawyer and Brown and Caldwell, which are leading firms in constructing CSO facilities, including projects that have been completed in other cities in less time and for less money.

11. NOIC Statement: The City notes that: 1) EPA included in the Order a completion date for construction of the RH-034 Tank of March 31, 2029 and for the OH-007 Tank, a completion date of May 1, 2028 (hereinafter, "EPA Dates"); 2) the EPA Dates are 17 months and 13 months

earlier, respectively, than the City's completion dates of August 31, 2030 and June 30, 2029 (hereinafter, "City Dates"), respectively; and 3) the EPA Dates are three months and two months earlier, respectively, than dates EPA had proposed to the City in November 2020. The City argues that the Order's completion dates are not achievable and that the earliest the City can complete construction is by the City Dates. NOIC at 8.

EPA Response: EPA disagrees that the EPA Dates are unachievable. EPA's responses to other NOIC statements above address many of the City's objections to the schedules for completing the CSO Tanks contained in the Order. The City fails to acknowledge in the NOIC that some of its own estimated completion dates have been earlier than the City Dates. The City's failure to provide clear and consistent schedule-related information is difficult to overstate.

EPA issued the Order on March 29, 2021. The City issued its Gowanus Neighborhood Plan Draft Environmental Impact Statement ("DEIS") for rezoning the area on April 17, 2021. Among the items contained in the DEIS was a 2028 completion year for both CSO Tanks, as shown in DEIS Figure 11-4. This schedule was even shorter than the EPA Dates. EPA's August 9, 2021 comments on the Rezoning DEIS noted the discrepancy between the DEIS and the City's position in the NOIC, as follows:

The City asserts that EPA's 2028 and 2029 CSO retention tank construction deadlines are not achievable by DEP, even though DEIS Figure 11-4 indicates that both tanks will be completed in 2028. DEIS Comments at 3.

The prospect of increased contaminant loading as a result of the potential for greater CSO discharges from rezoning in the Gowanus area and the increased frequency of severe storm events makes it all the more important that the City accelerate its work so that it complies with the schedule in the Order and avoids adverse impacts to the in-Canal remedy.

In an April 29, 2021 email to EPA, the City objected to EPA publicly noting the presence of the shorter DEIS 2028 tank completion dates during a Gowanus Community Advisory Group meeting on April 27, 2021. Despite that objection and EPA's later DEIS comment on the subject, the City ultimately retained the 2028 completion dates in the September 2021 rezoning Final Environmental Impact Statement.

Every additional year of delay in bringing the CSO Tanks online, even within the schedule required in the Order, is of concern. Since dredging began in November 2020, the City has been discharging hazardous substance-contaminated CSO solids into the cleanup area. EPA has estimated that 2,400 tons per year of CSO solids may be discharged to the Canal until the CSO tanks are online.

12. NOIC Statement: The City asserts that its one-year timeframe for procurement of construction contracts may be long when compared to other municipalities or the private sector. It indicates it will try to accelerate the work including primarily through overlapping certain aspects of its contracts. The City asserts that efforts to accelerate the work creates additional risk to the City in the event that completion of a preceding contract is delayed for any reason, stating that "the procurement process the City has developed for this project is extremely aggressive, risky and unprecedented." NOIC at 10-11.

EPA Response: The City's proffers regarding efforts to advance the schedule through streamlined contracting must be evaluated in the context of the City's prior contracting efforts and its noncompliance. EPA's November 6, 2020 letter denying the City's tank construction extension request addressed the City's contracting failures. See pages 4-5 of that letter.

Since EPA issued the City RD UAO in 2014, followed by the Tank RD AOC in 2016, the City has been under the affirmative legal obligation to mitigate project delays. As noted previously, the City conceded in February 2020 that it defunded the OH-007 Tank RD in July 2016, shortly after the Tank AOC became effective in June 2016. The replacement contract was not secured by the City until May 31, 2021. NOIC at 2. In the intervening five years, the primary design work was not being performed, nor did the City appropriately report the delayed status of its work. Based on information EPA obtained from the City in 2021 regarding the transfer and use of the OH-007 RD contract funds, the City took no steps, unprecedented or otherwise, to expedite the contracting process for OH-007, even after the ostensible reason for reallocating those funds ended.

Specifically, the Tank AOC provided that the City would fund designs at both the initial and proposed RH-034 Tank locations so that the City could move forward with the initial location if it was unable to purchase the property needed for the new location. Unbeknownst to EPA, the City funded the second RH-034 Tank design by using money that had been allocated for designing the OH-007 Tank. However, once the RH-034 Tank property was purchased in 2018, the City chose to not transfer (or as the City states, "descope") any of that money back to the OH-007 Tank RD, where it could have been utilized by the same contractors who have performed all of the design work to date for both CSO Tanks, and who later were the sole and winning bidder on the replacement OH-007 Tank RD contract finalized on May 31, 2021.

The City did, however, divert funds from the RH-034 Tank RD contract to its tunnel proposal, as well as several other efforts noted in the City's response above. By doing so, as well as descopeing the \$8 million balance of the RH-034 contract, the City left itself with inadequate funds and no contingency for even completing the RH-034 Tank RD.³ In a May 19, 2020 email to EPA, the DEP Project Coordinator stated:

When we submitted the CP3 Final [RH-034] Design to EPA on September 30, 2019, NYC acknowledged that the CP3 design would have to be revised to comply with the final [Memorandum of Agreement] with [the State Historic Preservation Office] to include the reconstruction of portions of the 234 Butler Street building's façade as a part of the Red Hook CSO Facility. ...There is no remaining scope, or budget, in the existing [RH-034] design contract to perform these further changes, and so a change order is required.

The assertion that the City has or will take extraordinary contracting measures to advance the project has yet to be reflected in the record for this Site. Instead, the record demonstrates that the City has

³ The City advised EPA on July 21, 2021 that \$21.8 million had been descopeed from the OH-007 Tank RD. The City's August 23, 2021 responses quoted above state that the total RH-034 Tank RD budget was \$18,281,590, suggesting that an additional \$3.5 million of the OH-007 Tank RD budget was reallocated elsewhere. These funds could have allowed the OH-007 Tank RD to continue until additional funds were added to complete it.

reallocated funds for its own priorities, leaving neither contracting nor funding in place to meet the City's legal obligations, whether required by consent or unilateral orders, for both tanks.

13. NOIC Statement: The City's schedule, shown in NOIC, Table 1, includes 10.5 months for procurement and 15 months for construction, totaling 25.5 months and leading to a December 31, 2022 scheduled completion date for the City's RH-034 site preparation work (CP-1). NOIC at 12

EPA Response: NOIC Table 1 indicates that 15 months are needed for site preparation. However, on several prior occasions, the City submitted different completion timeframes for this work. The City first proposed a July 6, 2020 schedule that indicated that CP-1 construction would take 18 months. A December 20, 2020 schedule indicated that 17.5 months were needed. The City's December 4, 2020 schedule indicated 15 months were needed, the number set forth above. Like EPA, the City clearly concluded that this work could be completed in a shorter period of time than the 18 months it had originally proposed. In EPA's technical judgment, this work can and should be completed in 14 months. With the application of value engineering and other practices, shaving one month off the City's 15-month estimate is achievable. The very small construction timeframe difference between EPA's and the City's schedules cannot be said to be arbitrary and capricious. Again, the City itself had found it possible to reduce its own schedule by three months.

14. NOIC Statement: The City suggests that EPA's requirement that it preserve ~80-year old brick from part of a building that will be used near the RH-034 Tank is a reason it needs more time to complete the RH-034 Tank because processing the brick adds three months to the CP-1 schedule. It asserts that EPA has required maximizing the redeployment of existing brick rather than using faux-aged brick that is a visual match. NOIC at 12.

EPA Response: The documentary record regarding the brick at 234 Butler Street, a historic structure on the location where the RH-034 Tank will be built, shows that, even if an additional three month extension is now warranted, the City created substantially greater delays by failing to address these requirements and commence the work. EPA's Memorandum of Agreement ("MOA") with the New York State Historic Preservation Office requires preservation and reconstruction of the brick and other key elements that form the Nevins Street façade and a 15-25 foot section of the Butler Street façade. In response to concerns raised by the City about its ability to salvage a sufficient quantity of usable brick, EPA indicated that it would permit the use of appropriate replacement brick. However, as documented by EPA in communications with the City, the City's own consultant indicated that it was feasible to reuse the brick, and declined EPA's request to submit clarifying documentation that would have supported the use of replacement brick which was a "visual match" for the original. Notably, the City's Design Commission separately required the City to maximize the reuse of brick, a position that the City failed to advise EPA of in subsequent communications on this issue.

Despite asserting that it would not be able to salvage sufficient quantities of brick, the City has advanced a design that involves the salvage and reuse of significantly more brick than the MOA requires to construct a 63-foot long Butler Street façade. Prior to the NOIC, EPA addressed the City's brick-related MOA noncompliance and its effect on the CP-1 and CP-3 schedules in an August 24, 2020 email to the City.

15. NOIC Statement: The City asserts that several factors complicate the RH-034 CP-1 schedule, such as significant regulated material abatement (asbestos, lead, PCBs) in the existing ~80-year-old buildings. NOIC at 12.

EPA Response: The City could have, but did not, identify such issues when it negotiated the Tank AOC in 2016, wherein the City agreed to perform the CP-1 work within 10 months. The City has not requested a modification of the CP-1 schedule pursuant to the relevant provisions of the Tank AOC, and, as noted previously, EPA has not approved any modifications to the Tank AOC schedule. The City therefore remains in continued noncompliance with the existing 10-month schedule.

16. NOIC Statement: The City's schedule, shown in NOIC, Table 3, includes 18 months for procurement and 57 months for construction, totaling 75 months and leading to a 6/30/2027 scheduled completion date for the City's RH-034 Tank below-ground work (CP-2) (NOIC at 14)

EPA Response: The Tank AOC provided a start date for CP-2 that included a removal action timeframe of 24 months, set to commence based on property acquisition timing. The Tank AOC did not include a timeframe for the construction of the below-grade CSO tank. As noted previously, changes to the Tank AOC schedule have not been approved by EPA, and the City therefore remains in continued noncompliance for failing to meet the CP-2 removal start and completion dates.

Absent a modification of the Tank AOC, EPA's Order schedule calls for 48 months in total for CP-2. This is six months shorter than the City's July 6, 2020 proposed schedule, which set the construction timeframe at 54 months; the City's December 4, 2020 proposed timeframe in the table above set it at 57 months. EPA again had to assess the overall validity of the City's changing timeframes. This task is complicated by the City conceding that some work can be completed sooner, while then extending other timeframes, in this instance for CP-2, without a readily discernable basis.

EPA also considered the City's tunnel proposal-related tank construction timeframes for CP-2 and CP-3, which were provided for comparison purposes. The City's CP-2 and CP-3 timeframes were combined in its tunnel submissions. The City submitted to EPA total tank construction durations of 6 years in a tunnel-related comparison on July 18, 2018 and 7.5 years in one on March 11, 2019.

It is unclear how the City developed the six-year or seven and a half year CP-2/3 timeframes as part of the tunnel proposal. The City did not provide EPA with its previously prepared Basis of Schedule Reports (dated, as previously noted, May 2017, January 2019, and June 2019) until December 11, 2020, after the tunnel proposal was rejected. It appears that the City may not have utilized these schedule memoranda when setting the six-year or seven and a half year CP-2/3 timeframes provided to EPA during the tunnel proposal, as they would have led to shorter timeframes. As in other instances, the City's tank construction projections for the purposes of a tunnel comparison are variable without explanation.

17. NOIC Statement: The City contends that EPA's schedule for the BODR in the Order, which is one month sooner than the City's, could not be met for reasons related to the time it takes to review and update the BODR as well as coordinate with others, including within DEP. NOIC at 18.

EPA Response: The City submitted to EPA conflicting and inconsistent schedules for updating the BODR, and then met EPA's schedule despite arguing it was not possible. Before arguing that four months was necessary to update the BODR, on three occasions (July 18, 2018, March 11, 2019 and May 17, 2019), the City's schedules stated that the BODR update would take three months. Twice (December 5, 2019 and July 2, 2020), the City stated that it would take nine months to update it, which is the same timeframe that was required to develop the initial BODR from scratch. EPA, after conferring with its consulting engineers, determined that nine months was an unreasonably long period to update the BODR. The Order included a schedule of three months, based primarily on three of the City's own submissions. In asserting in the NOIC that four months would be required, the City discounts its statements on five other occasions, both for shorter and longer timeframes. The City did not provide a cogent technical explanation supporting the basis for this schedule. Absent explanation, such variability appears to represent arbitrary positions on behalf of the City.

18. NOIC Statement: The City asserts that it has sufficient cause not to comply with the Order schedule because cost is an NCP criterion and the City and DEP continue to face a period of significant fiscal uncertainty caused by the ongoing COVID-19 pandemic. In addition, the City asserts that the Order's requirements for stormwater separation and treatment, and sampling and reporting related to such units, are inconsistent with the NCP. NOIC at 22.

EPA Response: As noted above in response to NOIC Statement No. 4, financial hardship does not constitute a valid sufficient cause defense. Further, EPA's November 6, 2020 letter denying the extensions requested by the City based on its assertion of financial hardship discussed financial documentation prepared by the City itself that demonstrated that the City does not have financial constraints with respect to water-related revenues, the source of funding for the work required under the Order. The City provided no financial information in its extension requests and has provided none since receiving EPA's November 6th response. The City also declined to discuss EPA's offer to provide a temporary staging area for the OH-007 Tank construction at no cost, in lieu of the City's plan to obtain such property permanently through eminent domain at a cost of roughly \$100 million.

The City's reference to the NCP cost criterion erroneously conflates the NCP remedy selection process with remedy implementation costs. An argument that the schedule EPA included in the Order requires the City to incur more costs than they would incur under a longer schedule is not grounded in the NCP. Instead, under the NCP, cost is one of the factors EPA considers in selecting a remedy.

The City acknowledges in the NOIC that the City waived its ability to "assert any claims, causes of action, defenses or challenges relating to the *selection* of the *CSO controls* in the September 27, 2013 ROD..." [emphasis added in the NOIC]. NOIC at 26-27. However, this NOIC excerpt from Paragraph 104 of the Tank AOC omits the opening portion of the waiver, which bars NCP consistency challenges:

Respondent waives and agrees not to assert any claims, causes of action, defenses or challenges relating to the selection of the CSO controls contained in the September 27, 2013 ROD, including but not limited to its consistency with CERCLA and the National Contingency Plan....

EPA sought this waiver for the express purpose of eliminating such future challenges and thereby ensuring that the CSO controls would be timely implemented. Having agreed to this waiver, the City cannot assert such NCP consistency arguments regarding the issues cited above.

19. NOIC Statement: The City suggests its alleged financial hardship is due to the currently high costs of the CSO Tanks, which it asserts are much greater than the ROD estimate. NOIC at 22.

EPA Response: As EPA has previously stated in writing to the City, the primary cost increases for the CSO portion of the remedy are ones that the City has voluntarily taken on by acquiring property through eminent domain (including through its RH-034 Tank location proposal and through permanent acquisition of property adjacent to the OH-007 Tank location) and by adding CSO tank design components not required by the ROD. It is difficult to reconcile these City-caused cost increases, as well as the City's unwillingness to collaborate on cost-saving measures, with the attempted avoidance of financial burdens the City discusses in the NOIC. Further, as part of the 2016 Tank AOC, the City agreed to perform costly dual designs for RH-034 pending the property acquisition (which, as mentioned above led the City to descope the OH-007 Tank RD contract, in violation of the RD UAO). Moreover, as provided in Paragraph 104 of the Tank AOC, the City affirmatively waived its rights in the Tank AOC to object to the CSO remedy, including the issue of increased costs.

20. NOIC Statement: The City asserts the Order requires the City to be responsible for separation and treatment of stormwater and for maintaining and monitoring the required treatment units at properties owned by third parties. NOIC at 24.

EPA Response: Since the Order was initially issued on March 29, 2021, EPA has repeatedly advised the City that it is only responsible for maintaining private outfall treatment units where the City has: 1) arranged with the property owner to treat separated stormwater from City-owned streets; and 2) the property owner fails to do so.

Paragraph 73.d of the Order confirms this:

The responsibility to install, operate and maintain EPA-approved treatment units at separated stormwater outfalls discharging any stormwater from City-owned property or streets may be delegated to private property owners as part of redevelopment plan approvals, but Respondent shall track, oversee and remain responsible for such Work.

Paragraph 73.d. is similarly clear that the City is responsible for requiring stormwater to be separated at Canal-side projects as part of the City project approval process. For stormwater generated within the project parcels, the developers are responsible for the separation, treatment, and maintenance. For stormwater at any adjoining City-owned street ends abutting the Canal that must be separated, it has been the City's practice at the Canal to require developers to make infrastructure improvements to the City-owned streets, including to the sewer lines and outfalls.

Following the City's submission of the NOIC, on July 23, 2021 EPA requested that the City provide certain supplemental information, including the following:

Please identify by name each City-owned street end that terminates at the Canal, and whether there is an existing CSO and/or separated stormwater outfall at such street end.

The City's October 5, 2021 response to EPA's above question was incomplete. EPA's review of the Canal street ends indicates that the only City-owned street ends that may likely become subject to separation in conjunction with redevelopment at adjoining parcels and that are not presently the location of an existing CSO or separated stormwater outfall, the Flushing Tunnel, or a bridge, are:

- 1) Degraw Street (west);
- 2) Sackett Street (west); and
- 3) Huntington Street.

Redevelopment projects are likely to result in stormwater upgrades at these three locations. It is possible that additional stormwater separation could occur at a handful of other street ends in connection with possible future sewer system repairs or upgrades.

The City's various objections to this requirement are misplaced and unwarranted. The Order provides a mechanism for the City to delegate the construction and maintenance cost for this work to the property owners. EPA would also permit the property owners to perform the sampling and reporting for such units, to be aggregated with the City's submissions. Several developers have indicated to EPA their willingness to assume responsibility for such tasks. All of this can be readily accommodated in the routine agreements through which the City requires dedication and maintenance of waterfront esplanades and other features as properties are redeveloped. EPA has already directly discussed such an approach with property owners, who indicated that they are amenable to this. Also, EPA has already entered into administrative orders with many property owners who voluntarily agreed to implement the required separation and treatment of stormwater on their properties. Pursuant to these orders, EPA has reviewed and approved a number of these outfalls and treatment units, and they have been installed.

Many of the City's street ends along the Canal have previously been conveyed to private property owners. The City could presumably convey the few remaining affected Canal-side street ends to developers and delegate the bulk of this issue in that manner.

21. NOIC Statement: The City quotes from several places in the ROD regarding the need for separation and treatment of stormwater, arguing that the ROD does not explicitly include some of the requirements contained in the Order related to ensuring that hazardous substances and solids from additional loads do not compromise the effectiveness of the permanent CSO control measures by exceeding their design capacity. The City then deems all the ROD language "aspirational" rather than part of the selected remedy. NOIC at 24-26.

EPA Response: EPA disagrees that the ROD language quoted by the City does not mandate such controls and again references the City's waiver of challenges and defenses to the CSO control remedy selection. Nevertheless, the ROD-cited language twice uses the mandatory verb "shall" regarding the application of sewage regulations: "...redevelopment along the banks of the Canal and within the watershed shall adhere to NYC rules for sewer connections...and shall be consistent with current NYDEP criteria and guidelines to ensure that hazardous substances and solids...do not compromise...the CSO control measures...." These statements are first used in the declaration of the

ROD's highlights and are repeated in the description of the selected remedy. See ROD at iii and 85. There is no basis for considering this ROD language to be without meaning or as surplusage.

EPA's discussion in the ROD of what CSO loads to the Canal would need to be addressed expressly referenced the mid- and lower Canal improvements projected as a result of the pumping station upgrades and force main replacement. See ROD at 5-6. The goal of separation and treatment is to preserve those CSO reductions and balance any increased future sanitary loads.

22. NOIC Statement: The City argues that it has not waived the right to challenge the requirement to control separate sewer and storm discharges ostensibly because the ROD selected CSO controls and separate sewers cannot be CSO controls, because separate sewers are not combined. The City further suggests EPA's requirement to control discharges was inconsistent with the NCP. NOIC at 27.

EPA Response: The meaning of "CSO controls" in the Tank AOC is set forth in Paragraph 18:

On September 27, 2013, EPA issued a ROD for the Site that selected the following response actions: ...12) CSO controls to significantly reduce overall contaminated solid discharges to the Canal, which include a) construction of retention tanks to retain discharges from outfalls RH-034 and OH-007, unless other technically viable alternatives are identified; and b) implementation of appropriate engineering controls to ensure that hazardous substances and solids from separated stormwater, including from future upland development projects, are not discharged to the Canal.

The CSO control remedy description as set forth above is the only place in the Tank AOC where this appears, other than the reference to "CSO controls" in the remedy waiver in Paragraph 104 provision found above.

The City cannot claim to have misapprehended the inclusion of stormwater separation and treatment in the ROD CSO remedy, now or during the negotiation of the Tank AOC. Contemporaneously with the Tank AOC negotiation, the City agreed to perform a "RD stormwater treatment pilot" for the City-constructed Carroll Street High Level Sewer Separation project and to comply with EPA's requirement that treatment units be installed on the separated stormwater outfall then under construction for the 1st Street street-end at the Lightstone development. The City has since collected RD pilot data regarding its separated stormwater treatment units.

The City's argument also includes the assertion that remedy selection for the precise stormwater treatment units must occur as part of the ROD. Implementation of ROD components to address future Site contingencies are refined and engineered during the RD and/or during implementation of the RA based on field conditions. Until a new outfall is being created, it is not possible to know how large the project will be, how much load the separated stormwater outfall will handle, whether the property use will require the equivalent of a SPDES permit with broader treatment and discharge parameters, and what type of treatment units are appropriate for specific situations as they arise. Thus, the point at which the treatment unit for an outfall is determined occurs when the project plan is submitted for City review. It is not possible to know in advance specific developments that may impact the remedy.

As amended, Paragraph 73.d. of the Order provides for two options for EPA approval of treatment units: “Respondent shall request EPA approval for treatment units on a project-by-project basis, or, as appropriate, for a set of standardized units.”

It is not arbitrary and capricious to not precisely cost out and determine in advance every relatively minor remedy subcomponent or remedial activity costing a fraction of a percent of the overall Site remedy.

Notably, the City argued in its April 26, 2013 letter commenting on EPA’s Proposed Plan for cleanup of the Site that EPA was not properly addressing contamination loads from permitted and unpermitted outfalls. See the 4/26/13 letter at pp. 11 and 37. The City’s current position that EPA should not be requiring treatment at new stormwater outfalls is inconsistent with those earlier comments.

For the reasons stated above, EPA believes that it is apparent that the CSO controls in the ROD include implementation of engineering controls, i.e., treatment units, for separated stormwater from future upland development. The City waived the right to challenge these requirements.

23. NOIC Statement: The City argues that page 85 of the ROD applies by its terms only to regulation of “additional sewage loads” and that Paragraph 73.c. of the Order imposes those requirements on “stormwater and sewage loads.” NOIC at 27.

EPA Response: The City’s position does not reflect a meaningful distinction. All forms of additional loads to a combined system are potentially relevant to the effectiveness of the remedy selected in the ROD. The additional sewage load may take a number of forms, including increased volumes or increases in relative solids or contaminant loadings.

Efforts to reduce CSO discharges from the combined sewer system are intrinsically tied to managing both sanitary and stormwater volumes that enter the combined sewer. For this reason, the Rezoning DEIS and FEIS, as well as the Uniform Stormwater Rule, contained entire chapters and appendices seeking to analyze the net CSO impacts from both increases to and control of sanitary and stormwater loading. These changes to sanitary and stormwater loads may result from new sanitary loads, from increased stormwater from climate change causing more frequent and intense storms, or from changes to how the combined sewer system operates and functions.

The ROD evaluated and addressed the inputs and impacts of loads to the combined sewer system in a way that is consistent with the City’s DEIS and FEIS evaluation of CSO inputs and impacts. As with the rezoning, implementation of the ROD requires the continued assessment and control of any increased loads which would otherwise discharge to the Canal and impair the protectiveness of the remedy.

The City’s own Long-Term Control Plan (“LTCP”) for the Canal also relies on this interconnection in evaluating compliance options. See, for example, LTCP at 8-63.

24. NOIC Statement: The City argues the federal government lacks authority to approve property acquisition by a local government, or to mandate that the City obtain access to any property. The Order requires EPA to approve the locations needed for the OH-007 Tank [those for the RH-034 Tank have already been acquired]. The City also argues that the Order provisions merely require the City to use best efforts to obtain access. NOIC at 27-28, and footnote 8.

EPA Response: As a preliminary matter, it should be noted that the City's NOIC arguments and its prior and current actions in relation to the acquisition of property necessary to effectuate the remedy are in direct opposition. When discussing the selection of the site for the RH-034 CSO Tank, the City expressly requested that EPA opine that CERCLA preempts the requirements of the New York State Eminent Domain Procedure Law in the context of the requirements of the State Environmental Quality Review Act, the New York City Environmental Quality Review, and the City's Uniform Land Use Review Procedures. EPA stated in its response that CERCLA enables EPA to preempt state and local law if necessary for the purposes of selecting the type and location of remedial activities. As a consequence, the Tank AOC contains specific requirements that the City must obtain access to property, by acquisition or otherwise. See Tank AOC Paragraphs 3, 44.a., and 44.b. The provisions of the Tank AOC demonstrate the City's recognition of and acquiescence to EPA's authority to select and approve the location of the remedy.

As the City has previously recognized, Congress provided EPA authority under CERCLA Section 104, 42 U.S.C. § 9604, to select the location and construction of necessary facilities for a CERCLA remedy. EPA's authority to construct remedies takes precedence over other federal, state, and local legal requirements, a point further demonstrated by the permit exemption of Section 121(e) of CERCLA, 42 U.S.C. § 9621(e).

However, the City is attempting to create conflict where none exists. EPA's approval of the property where the OH-007 Tank will be constructed in no way restricts the City's ability or authority to wield its power of eminent domain for its own ends. Here the question turns not on the mechanism for acquisition of the property, but as part of the ROD remedy, which property is appropriately selected to construct the CSO Tanks. That authority lies squarely with EPA. Further, as discussed above, CERCLA would preempt any state or local law that serves to restrict EPA's ability to effectuate the remedy (in this case, the portion addressing the construction of the CSO Tanks). The City is performing this portion of the remedy in lieu of EPA.

The City's citation to the Uniform Relocation Assistance and Real Property Acquisition Policies Act ("URARPA"), rather than supporting the City's argument, serves to reinforce EPA's point above. URARPA governs how property is either acquired by the federal government, or, as here, acquired by another entity pursuant to federal statutory authorities.

With regard to the City's assertion that the Order only requires "best efforts" to obtain access to needed property, this argument is likewise unavailing. EPA exercises its access authority pursuant to Section 104(e) of CERCLA, 42 U.S.C. § 9604(e). As PRPs cannot use EPA's authority to issue orders for access to property owners, EPA includes this provision in all of its enforcement instruments that require response activities by a PRP. Here, the City's best efforts would include payment of reasonable sums to obtain access. Should the City fail to gain access through the use of mechanisms available to it, EPA might, but is not obligated to, exercise its authority to issue an access order and seek recovery of the costs related to issuing it from the City. Any difficulty the City encounters in obtaining access does not limit the obligations of the City to complete the construction of the CSO Tanks as part of the permanent remedy for the Site.

25. NOIC Statement: The City argues EPA lacks authority to require the City to ensure that sewer and stormwater controls at the Canal comply with City law. The City asserts that only the City

has such authority under City law. The City further complains that its suggested language to address its concern was not included in the Order. NOIC at 29.

EPA Response: While this argument focuses on the City's primacy in relation to local law, the City's stormwater regulations have been promulgated in response to federal regulatory requirements under the Clean Water Act ("CWA"). EPA, in addition to having independent enforcement authority under the CWA, has incorporated the City's stormwater regulations as an applicable or relevant and appropriate requirement in the ROD so that adverse impacts to the Canal cleanup remedy can be avoided.

It is routine for CERCLA remedies to include as enforceable requirements the standards of other governmental entities. Once included in a CERCLA remedy, if such entities' standards are not being adhered to, EPA may take action under CERCLA to enforce such standards.

EPA is not disputing the City's generally independent authority to implement and enforce City regulations. With these stormwater regulations having been incorporated into the ROD, Paragraph 73(c) of the Order has the limited purpose of ensuring that the CERCLA remedy can be protected by EPA in the event that the City inappropriately fails to implement these regulations, such as by granting a given developer an improper exemption from such regulations. EPA could also issue an order enjoining such a developer from improper discharges, based on the incorporation of these regulations in the ROD. In multiple consent orders with EPA, the developers have directly agreed to comply with the ROD stormwater separation and treatment requirements.

The City's reliance on the case law it cites on the issue of EPA's authority is also misplaced. Those cases dealt with the federal government directing a unit of state or local government to enforce federal requirements. As noted above, the statutory scheme of CERCLA provides that EPA can incorporate the substantive, appropriate and relevant environmental requirements of other laws or regulations into a CERCLA response action and thereby make it enforceable by EPA.

At other major EPA Superfund sediment sites, it is common for the local government agencies to collaborate with EPA in setting and implementing water quality remedy provisions. The City's overall opposition to the stormwater separation, treatment, regulation, sampling, and reporting provisions of the Order only underscores the need for this requirement in the Order. Any failure on the part of the City to ensure that developers adhere to the separation and treatment requirements of the Order and the ROD would likely constitute a separate violation of the Order.

26. NOIC Statement: The City asserts the Order requirement that "stormwater shall be separated to the maximum extent practicable" would require private developers to seek State Pollutant Discharge Elimination System ("SPDES") permits from the New York State Department of Environmental Conservation ("NYSDEC") and that the authority to grant such a permit is not with DEP or EPA, but instead with NYSDEC. NOIC at 29.

EPA Response: We are not aware of SPDES permitting requirements for separated stormwater for private properties. Separation of stormwater is routinely required by EPA's bulkhead consent orders for the Site. In connection with NYSDEC's review and comment on such orders, NYSDEC has not indicated the need for SPDES permits in order to implement EPA's ROD-required stormwater treatment. NYSDEC contributed the language referencing the City's stormwater regulations as part of its

concurrence on the ROD.

Pursuant to the applicable regulations, a developer may be required to prepare a Stormwater Pollution Prevention Plan. Such plans have been submitted to EPA for review in connection with EPA's stormwater separation and treatment requirements, and have also been submitted to the DEP.

There are generally no SPDES outfall treatment standards imposed by NYSDEC at the Canal; the only treatment requirements are set forth in the ROD. As a result, at present, even when the City has separated stormwater, such as at Carroll Street and 9th Street, only EPA's ROD-required treatment requirements have been imposed. As with the City's stormwater regulations, incorporation of these requirements into the ROD authorizes EPA to implement them as part of the Canal cleanup. It also should be noted that permitting or other procedural requirements cannot be required at the Site because of the permit exemption contained in CERCLA Section 121(e) and 40 CFR 300.400(e), but the substantive requirements should be met.

27. NOIC Statement: The City asserts that it does not need to comply with the Order's requirements in Paragraph 73.b., c., and d., for reporting, stormwater regulation implementation, stormwater separation, treatment and sampling, because it has substantially complied with EPA's goal of preventing recontamination as a result of the CSO Tanks being designed to achieve CSO solids reduction well beyond ROD requirements, and the expanded City Unified Stormwater Rule ("USWR"). NOIC at 29-30.

EPA Response: The City is not authorized under CERCLA to substitute its own remedial approaches for those selected by EPA in the ROD and required under the Order. EPA is charged with ensuring the remedy is protective of human health and the environment and is effectively implemented. The City has not provided EPA with information supporting the asserted effectiveness of its USWR, either in the FEIS in connection with the rezoning or elsewhere. This lack of information, together with the City's stated intention that it does not need to fully comply with the above provisions of the Order and thus the ROD, instead raises remedy impact concerns based on increased contaminant loading due to the rezoning and more frequent severe weather events.

While the USWR will potentially reduce or delay certain stormwater releases to the combined sewer system, the USWR does not directly address the ROD requirement to separate and treat Canal-side street-end and private stormwater to offset new sanitary loads entering the combined system that may compromise the selected remedy. The Canal is narrow, with tight bends that limit tidal flushing and only artificial flow inputs (e.g., the flushing tunnel, CSO discharges, direct stormwater runoff). The influence of stormwater and CSO discharges on surface sediment concentration is therefore magnified as compared with other waterbodies, which has led EPA to focus on these sources of contaminant discharge. The Order provisions regarding separation and treatment, in combination with the City's regulations, are necessary measures to ensure long-term remedy protectiveness.

28. NOIC Statement: The City objects to various monitoring and reporting requirements in Paragraph 73 of the Order, including reporting on the volume of water treated, the amount of solids that entered the treatment system, and the amount of solids captured as measured by the weight of materials shipped off-site at each of the CSO Tanks. The City argues that solids

removed from the CSO Tanks will consist mostly of grit, while potentially contaminated organic solids will remain in the Tanks and be pumped to wastewater treatment facilities. The City asserts that measuring the weight of materials shipped off-site is thus impossible to accurately determine and also not an appropriate measure of solids captured. NOIC at 30-31.

EPA response: EPA disagrees that it is “impossible” to monitor and report on solids capture. The Order provides for the City to submit its proposed approach to obtaining the required information to EPA. EPA recognizes that certain information will need to be estimated and collated, such as the distinction between grit removed and solids pumped for treatment. However, all these issues can be resolved through engineering solutions during the review and comment process, with meetings and discussions as necessary and appropriate. The City asserts on NOIC page 30 that because the CSO Tanks were designed in a manner that exceeds the ROD requirements, this constitutes substantial compliance which makes it unnecessary to document that this projected level of performance is being achieved. EPA believes that tracking the performance of the CSO Tanks is necessary to confirm whether the remedy is working effectively, whether the design capacity of the permanent CSO control measures is being exceeded, and other related information.

The City’s objections on NOIC pages 31-35 regarding reporting, separation, treatment and sampling of stormwater and sewage suffer from flaws and inaccuracies similar to those made in other parts of the NOIC. They are largely predicated on a challenge to the ROD’s CSO remedy provisions on the grounds that they are arbitrary and capricious or inconsistent with the NCP. Without repeating all of EPA’s responses above, we note again that the City waived its right to challenge any aspect of the CSO portion of the ROD. The work elements referenced in these City objections are necessary for ensuring that the remedy remains protective, that the remedy components are functioning properly, and that any changes to contaminant inputs to the Canal are identified. As with the CSO tank solids reporting requirement discussed above, which the Order provides a process for developing, many of these issues can be readily addressed during implementation if the City chooses to comply.

29. NOIC Statement: The City asserts that neither the requirement to test for or to perform maintenance dredging is within the ambit of the Order or the ROD. NOIC at 34-35.

EPA Response: When the City sought to change the location of the RH-034 Tank, it was aware that construction at its proposed location engendered significant delays, that the delays would cause the completion of the tanks to be further behind the dredging, and that there was therefore the strong possibility that recontamination of the dredged areas would result. For that reason, the City and EPA discussed that the City should, in a future settlement for remedial action, evaluate, and, if appropriate perform maintenance dredging, as well as evaluate whether a design change to the cap might be needed to remain protective in the face of maintenance dredging. This was acknowledged, in part, in the Tank AOC by the following language:

[In accepting the changed location] EPA has also taken into account Respondent’s commitment to perform, under a future settlement, the removal from the Gowanus Canal of contaminated CSO solids resulting from CSO discharges that occur after the completion of the dredging component of the Canal remedy but prior to the commencement of the operation of the RH-034 Tank, if any such removal is required to address recontamination of the Canal following implementation of the dredging

component of the Canal remedy, as well as Respondent's recognition that, under the RD UAO it must cooperate and coordinate with National Grid to insure that the design of in-Canal cap will withstand any such additional removal. Paragraph 23.

This NOIC argument by the City ignores both its prior commitments and the potential for harm caused by its delays.